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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SERGIO RENTERIA, Defendant and Appellant.	E043337 (Super.Ct.No. FVA25806) OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight III, Judge. Affirmed with directions.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of one count of soliciting a minor, who was at least four years younger than him, to use narcotics (Health & Saf. Code, §§ 11353, 11353.1, subd. (a)(3)) and two counts of furnishing methamphetamine to a minor, who was at least four years younger than him (Health & Saf. Code, § 11353). In bifurcated proceedings, the trial court found true an allegation that defendant had suffered a strike prior (Pen. Code, § 667, subds. (b)-(i)). Defendant was sentenced to prison for 18 years and 8 months. He appeals claiming his motion to suppress evidence was improperly denied, the trial court erroneously admitted evidence of another crime and the jury was misinstructed requiring reversal. We reject his contentions and affirm, while directing the trial court to correct an error in the abstract of judgment.

FACTS

A.,[1] who was 17 at the time of the crimes, testified that her friend, T., who was almost 16, called her between 6:00 and 8:00 p.m. on October 18, 2005 and asked her to come to a motel near A.'s home and bring her sanitary pads. They met halfway between the motel and A.'s home. T. told A. that she was with the defendant at the motel. The 32-year-old married defendant, who was a long-term resident of the town in which the motel was situated, and with whom A. was vaguely familiar, let the two girls into the motel room. The girls talked for five or ten minutes as they stood, while defendant sat on

[1] She had been given use immunity for her truthful testimony.

the bed. Defendant asked A. if she wanted to smoke methamphetamine,[2] she indicated she did and he packed a glass pipe with the drug, which was in a baggie. Defendant melted the drug inside the pipe with a lighter that was in his possession, smoked the drug, passed the pipe and the lighter to T., who did the same thing, then she passed both to A., who did as they had. This was repeated twice, during which defendant may have repacked the pipe a second time.[3] Defendant walked outside the room, leaving the victims inside. T. told A. to grab a baggie of methamphetamine[4] that was sitting on a piece of furniture, saying it was defendant's but she wanted A. to hold it for her, and A. did,[5] putting it in her pocket.[6] Defendant returned to the motel room and the girls left, returning a couple hours later. Defendant again let them into the room, but left almost

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[2] A. testified that she had smoked methamphetamine at least 50 times before. She admitted that she had lied to the officer and at the preliminary hearing, saying she had smoked only a few times before. She said she testified at the preliminary hearing that she had smoked the last time two months before October 18, 2005.

[3] A. told the arresting officer that at some point, defendant handed her the pipe to smoke.

[4] On direct, A. could not recall at trial if this was the same baggie defendant had used to fill the pipe, however, at the preliminary hearing, she said it was and during cross examination, she said it was not.

[5] She admitted that she lied to the officer that night and said T. had given the baggie to her.

[6] A. told the arresting officer that T. had given her a baggie of methamphetamine, which was defendant's, because they were going to run some errands and T. had no pockets on her clothing in which to keep it, but A. did. T. acknowledged that she had no pockets in her clothing that night. A. also told the officer that she had seen defendant put methamphetamine from the baggie into the pipe and all three smoked it.

immediately. After he was gone, the girls smoked the methamphetamine that remained in the pipe from the first time they and defendant had smoked. While they were waiting for defendant to return so he could give A. a ride home, they saw a police car in the parking lot. When the arresting officer and a female officer came to the motel room door and T. let them in, A. sat on the pipe in an attempt to conceal it from the officers. The arresting officer asked the girls if they knew anything about methamphetamine in the room and they denied that they did. As the officers began searching the room, A. stood up, revealing the pipe. She also pulled out the baggie of methamphetamine she had put in her pocket.[7]

Defendant had first admitted to the officer who arrested him that he had used $20 worth of methamphetamine with T.[8] on the evening of October 18, 2005 in the motel room he rented and "there might be another female in the room . . . [and she] might be

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[7] A. told her continuation high school principal that she and T. were in the motel room alone after defendant left, and they had done nothing, when T. realized the police were there and told A. there were drugs in the room and instructed her to hide them. A. put a baggie in her pocket. She said that she forgot about the baggie until the female officer began to search both girls and that officer found it. A. said she knew the drugs belonged to defendant. Although being asked by her principal if she had gone to the motel room to get high, A. did not admit having used drugs there. A.'s next door neighbor (whom A. accused of trying to intimidate her and who had been granted immunity) testified that the day after the crimes, A. told her that the drugs were hers. However, when the police interviewed the neighbor, she did not tell them this.

[8] The officer's report said that defendant admitting smoking methamphetamine while the two females were in the room with him, not smoking with either of them. However, the officer's recollection was that defendant said he and T. smoked the methamphetamine together.

under the age of 18" then he admitted he smoked with both girls.[9] He added that he

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[9] The officer also testified as follows,

"[DEFENSE COUNSEL]: When you initially made contact with [defendant], and you began to talk about drug use that he may have been involved with recently, [defendant] first told you that he had smoked in the room while [T.] was in there; is that right?

"[THE OFFICER]: Yes.

"[DEFENSE COUNSEL]: And [defendant] didn't mention any other female at that point; is that correct?

"[THE OFFICER]: Under the initial, no.

"[DEFENSE COUNSEL]: Okay. Now, you have told us that when you were questioning [defendant] subsequently he indicated to you the presence of another female, and that he was smoking while those females were in the room as well; is that correct?

"[THE OFFICER]: Yes.

[¶] . . . [¶]

"[DEFENSE COUNSEL]: And then it wasn't until after -- back to your conversation with [defendant]. Later on in the conversation with [defendant], he then told you well, there's another female in the room who happens to be a friend of [T.]; correct?

"[THE OFFICER]: Yes."

[¶] . . . [¶]

"[DEFENSE COUNSEL]: And according to what your recollection is after reviewing your report, it said that [defendant] had smoked methamphetamine while in the hotel room with the female; right?

"[THE OFFICER]: Yes.

"[DEFENSE COUNSEL]: All right. And with respect to the second time [defendant] talked to you, all he told you was that both of these females had been present while he smoked methamphetamine; correct?

[¶] . . . [¶]

"[DEFENSE COUNSEL]: Is that what your report said?

"[THE OFFICER]: Yes, it does.

[¶] . . . [¶]

"[THE PROSECUTOR]: You indicated -- while in the report, do you remember if you ever said they smoked with [the defendant]?

"[THE OFFICER]: Yes, I believe the first time [defendant] admitted that [T.], he smoked with her.

"[THE PROSECUTOR]: But you're not sure about the other girl, whether he mentioned the other girl?

"[THE OFFICER]: I'm not sure on that one."

smoked in the room with the two a second time. He also said there might be methamphetamine still in the room. The officer found a digital scale with the residue of a white powdery substance on it, consistent with methamphetamine, in a secret compartment of defendant's car. After the officer went to the motel room, A. moved from near the door to the bed where she sat down. When the officer asked twice whether there were any drugs in the room, A. lifted up a towel that was on the bed revealing the used meth pipe. The officer asked if there were any other drugs or pipes in the room. A. stood up and pulled a baggie containing methamphetamine out of her back pocket. The officer observed signs of defendant and both girls being under the influence of methamphetamine.

T.,[10] testified that on October 18, 2005, her mother had asked defendant, a family friend, to pick up her daughter because the latter was fighting with her aunt. Defendant took T. to the motel, where he checked in to a room. There, T. watched TV and did her homework while defendant lay on the bed because he did not feel well. In response to T.'s request, defendant put a clean methamphetamine pipe on the bed.[11] T. had some methamphetamine in her bra.[12] She called A. to come over to the motel room to bring her sanitary pads. T. took the pipe, went to the bathroom, removed the baggie of

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[10] She had also been granted immunity for her truthful testimony.

[11] T. told an investigator that the pipe was hers.

[12] T. testified that she had ingested methamphetamine at least 20, but less than 50 times before.

methamphetamine from her bra and put $20 worth of it into the pipe. As defendant remained in the bed, T. began using her own lighter to smoke the methamphetamine, while she held the baggie with the remaining methamphetamine in her hand. After taking two or three hits off the pipe, she put the pipe, which still had some methamphetamine in it, on the table near her school books and left the room to meet A., still holding the baggie of methamphetamine.[13] On their way to the room, A. asked T. if the latter "had anything[,]" meaning methamphetamine. T. said she had a little bit. When they got inside the room, A. asked T. if there was anything in the pipe. After A. asked if she could have some, T. handed the pipe to A., who began smoking. Defendant was still lying on the bed. The girls smoked for 10 to 15 minutes, with T. taking two or three hits. When they were finished, there was about $10 worth of methamphetamine left, and, upon A.'s request, T. gave it to her. T. then called her male friend to come and pick them up. He arrived less than five minutes later and the girls left with him to go to another place to smoke more. They returned to the room at least 20 minutes later. Defendant told them that he had left while they had been gone, returned and was going to leave again, which he did. The pipe was on the bed, where the girls had left it, but no one used it this time to smoke methamphetamine.[14] T. had seen the police in the parking lot, but assumed it had

[13] T. told the arresting officer that throughout the night, defendant loaded a pipe with his methamphetamine and participated in the smoking of it and he handed her what was left in a baggie, which she gave to A. to hold because she had no pockets on her clothes and they were leaving to run errands. She also told an investigator that defendant smoked with them.

[14] However, T. told the investigator that she and A. smoked again during this time.

nothing to do with her. Suddenly, there was a knock on the motel room door by the police and T. opened it. The officers asked where the drugs were, as defendant had told them there were drugs in the room. T. denied there were any drugs there. She was asked again and denied it again. Then, a female officer came in to search the girls and found in A.'s pocket the methamphetamine T. had given her. The police told T. that they had arrested defendant and he had said that there was methamphetamine in the room. T. denied that defendant had smoked methamphetamine with them that night.[15] However, she admitted telling an investigator that she told the police that night that she did not know if it was defendant's methamphetamine. She allowed that she could have told the investigator that A. told the police the methamphetamine was defendant's and she did not want to say it wasn't.[16] However, she said that if she told the arresting officer that defendant had given her a bag of methamphetamine, she would have been lying.[17]

1. Motion to Suppress

The officer who arrested defendant testified at the hearing on defendant's motion to suppress that on October 18, 2005, at 11:39 p.m., he was in the parking lot of a motel

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[15] However, see footnote 3, *ante*, at page three.

[16] The investigator testified that T. agreed with A. that the methamphetamine was defendant's.

[17] The arresting officer testified that T. told him that defendant had given her a bag of methamphetamine "to hold" and she had given it to A. to hold for her because she had no pockets in her clothing and they were going to run some errands. The investigator testified that he asked T. about her statement to the officers at the motel room that when asked if defendant owned the methamphetamine that had been given to A., she said, "I guess."

when he saw the SUV defendant was driving and noticed it had only paper plates and no DMV paperwork affixed to the right front windshield. The officer knew that frequently, stolen vehicles have paper plates. The officer stopped the vehicle to determine why it did not have plates. He asked defendant for his driver's license and the vehicle's registration. Defendant gave the officer a California Identification Card, but not a driver's license, and a bill of sale for the vehicle, but no registration certificate. The officer asked defendant what he was doing in the motel parking lot. Defendant said he was there to pick up a friend.

Within a minute of the stop, the officer had defendant get out of the vehicle. Based on the officer's experience, a driver who hands him an identification card instead of a driver's license does so because the driver does not have a driver's license or has a suspended one. There were no other officers present to "back up" the officer and he had defendant get out of his vehicle for the officer's safety.

Immediately upon defendant getting out of his vehicle, the officer told him that he was going to pat him down for weapons because he feared for his safety. Also, defendant had tattoos and the officer feared he might be a gang member. During the pat down, the officer heard the clanging of a key and a piece of plastic in defendant's pocket and he felt what he believed to be a motel key there. At this point, the officer suspected defendant may be under the influence of methamphetamine. The officer asked defendant why he had a motel key. Defendant admitted that it was a key to the motel and he had been staying there. The officer asked defendant for permission to retrieve the key, defendant

gave it and the officer took the key from defendant's pocket. Defendant told the officer he had lied to him about why he was in the parking lot because he was actually there to "get his groove on" with a female, but he was married and didn't want his wife to know. He further said that he was not able to "get his groove on" because the female was "OTR."[18] While the officer was talking to defendant, he was running the information about defendant and his vehicle through dispatch. At the conclusion of about 5 minutes of conversation between the officer and defendant, the officer learned that defendant had an expired driver's license. Defendant continued to exhibit signs of being under the influence of methamphetamine, i.e., he was unable to stand still, he was jittery, spoke rapidly and his pupils were dilated. The officer asked defendant when he last used drugs. Defendant replied that he had used $20 worth of methamphetamine earlier that evening, at the motel room, with a female he identified by name. He added that there was possibly another "girl" in the room with whom he had used, and he was not sure of her age, but she may have been under 18. This conversation occurred within five minutes of defendant stepping out of the vehicle. The officer asked defendant if it was possible that there was still methamphetamine in the motel room or in his vehicle or if the latter contained anything else illegal. At first, defendant said no, then he said there may still be some methamphetamine in the motel room, but he was not sure. The officer asked defendant for consent to search the motel room and the vehicle and defendant gave it.

[18] OTR is the abbreviation for "on the rag", meaning that she was having her period.

The officer called for back-up. After it arrived a short time later, the officer handcuffed defendant and put him in the back seat of his patrol car. The officer ran the Vehicle Identification Number on the vehicle and discovered that defendant was the registered owner. In a secret compartment in the car, the officer found a set of scales with white residue on it, which he suspected was methamphetamine. The officer went to the motel's office and asked the manager if defendant was a registered guest of the room which defendant had consented to have the officer search. Five to seven minutes after he had placed defendant in the back of his patrol car, the officer approached the motel room and knocked on the door. Both of the young ladies inside answered. The officer told them defendant had consented to have the room searched and indicated that there may be drugs there. One of the young ladies showed the officer a glass methamphetamine pipe and, in response to the officer's question whether there was methamphetamine in the room, showed him a baggie of it in her back pocket.

The trial court ruled that there was probable cause for the detention, it was not unduly prolonged and it was reasonably related to a legitimate investigation. The court further ruled that the officer was entitled to pat defendant down when he got out of the vehicle and to arrest him as soon as he discovered defendant was driving without a license. Finally, the court concluded that defendant consented to the search of the vehicle and the motel room. The court denied defendant's motion to suppress.

Defendant begins his attack on the denial of his motion by asserting that the officer lacked reasonable suspicion to detain the vehicle. Because in his reply brief,

defendant so thoroughly parses the officer's testimony at the hearing on this matter, we will quote the transcript, as follows,

"[THE OFFICER]: I noticed that [the vehicle] did not have *any license plates on it at all*.

"[THE PROSECUTOR]: Why did that draw your attention?

"[THE OFFICER]: Just from previous police contacts in talking with vehicle theft suspects, it's common practice to -- if a vehicle is stolen, they'll take the license plates off and put either different license plates on, leave the plates off completely, or put used car or new car paper plates on it to disguise the fact it's a stolen car.

"[THE PROSECUTOR]: When a vehicle doesn't have a license plate, is there any other form of identification that needs to be affixed to that vehicle to show its registration to be on a public highway?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: And where is that normally kept or where is that supposed to be kept?

"[THE OFFICER]: Normally it would be in the front right windshield portion of the vehicle if it was purchased from a dealership.

"[THE PROSECUTOR]: And did you observe any paperwork in the front window?

"[THE OFFICER]: Not at the time that I stopped him.

"[THE PROSECUTOR]: And based on those observations, you conducted a traffic stop of the vehicle?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: And what was the main purpose for conducting the traffic stop?

"[THE OFFICER]: To see why the vehicle didn't have any license plates on it."

The foregoing belies the assertion in defendant's opening brief that the officer "made no attempt to ascertain whether [defendant's vehicle] bore the temporary registration . . . before he stopped the vehicle for having paper plates."

Next, defendant asserts that the officer should not have patted him down because the latter had no specific and articulable facts to form a reasonable suspicion that he was armed and dangerous. The People counter, asserting that the officer had probable cause to arrest defendant for driving without a driver's license[19] when defendant failed to produce same after asked for it by the officer and, once arrested, is subject to search of his person and the area immediately within his reach. Defendant responds to this, asserting this was not a theory presented below, and, therefore, should not be utilized by this court. However, he is incorrect. In their written opposition to defendant's motion to suppress below, the People asserted, " . . . [B]ased on the defendant not having a valid driver's license, the officer was permitted to conduct a pat-down search subject to arrest.

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[19] The People also correctly assert that the officer had probable cause to arrest defendant for the additional reason that he did not have license plates or a valid registration.

When a driver of an automobile does not have a valid driver's license the law requires that the person be arrested . . . . [Citation.] When it becomes necessary for an officer to confine a law violator in his patrol vehicle he can conduct a pat-down search of the suspect. [Citation.]" As stated before, in denying defendant's motion to suppress, the court below found, "[W]hen [the defendant] exit[ed the vehicle], the officer, under the case law, is entitled to a pat down search. The officer had the right to arrest [defendant] as soon as he discovered that he was driving without a license." If defendant cares to split hairs and assert that the officer did not, in fact, place him under arrest when defendant failed to produce a driver's license (and vehicle registration), but, rather, waited until some minutes later, then we would rely on the doctrine of inevitable discovery to justify the pat down.

2. Admission of Victim Intimidation Evidence

Before trial began, the People moved to be permitted to introduce evidence that A. had been threatened, at defendant's request, concerning her testimony. The People sought to use this evidence both to bolster A.'s credibility and to show defendant's consciousness of guilt.

At a hearing on the request, A. testified that on January 24 or 25, 2006, her next-door neighbor told her that defendant had called the neighbor and wanted her to tell A. not to come to court and testify at the preliminary hearing, and if she did, to say that the

drugs did not belong to him.[20] This caused A. to worry about what would happen if she came to court.

A. also testified that one or two days before this, T. had A. brought to a meeting place, where T. told A. that T. had decided not to testify, she did not want A. to testify and defendant did not want either of them to testify because if they did not, there wouldn't be a case against him. T. told A. that a friend of defendant's concocted a plan whereby A. would be kidnapped, which was okay with defendant as long as he did not have to go to prison. There was also a plan for T. to "get a hold" of A., beat her up and take her to where defendant and his friends would be. A. assumed this plan was defendant's, because he was the one who told T. about it, although T. said it was defendant's friend's idea. Because T. was a friend of A.'s, T. told defendant she could not participate in such a plan and she and defendant agreed to an alternate plan[21] to keep A. with her until after the preliminary hearing, with frequent contact between T. and defendant to ensure that A. remained with T. Hearing about this plan from T. frightened A. T. initially followed the plan, keeping A. with her, against the latter's will, and at one point, stopping at a house where defendant was present and he greeted A. A. asked T. to have her taken home because she had school the next day, but T. replied she could not, as

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[20] Mysteriously, defendant omits this attempt to intimidate A. from his recitation of the facts.

[21] A. testified that T. told her that defendant's friends had concocted this plan, but she believed it was actually defendant's.

defendant would think that T. broke her word to him and lied to him about keeping A. with her. T. feared that if she did not keep her word to defendant, or let A. get away, defendant would harm her or her family. T., however, allowed A. to go home to pick up clothes for school upon the latter's promise to return right away. However, once inside her home, A. failed to come back out to be taken back to where T. was waiting for her. The next day, T. was waiting for A. as the latter came out of her house to go to school. A. retreated into her home, re-emerged only when being escorted by her mother and stepfather and thereafter had her mother drive her to school. While at school, a schoolmate told A. that a female named T. and a male companion, both riding in a car that matched the description of the car T. and her male companion had been riding in that day and the day before, were looking for her and T. said for A. to go home "or else." This caused A. to fear for the safety of her mother, who was at home, alone. The same afternoon, an unknown man had come by A.'s home, looking for her to discuss the case with her. A.'s mother became angry and asked the man to leave. The man then got angry and told the mother to "watch what's going to happen to her" and to tell A. not to come to court to testify. This made A. feel even more fearful for herself and her family. She immediately moved away from the family home, leaving her mother and siblings there, and she continued to worry about their safety. When A.'s neighbor spoke to her one or two days later, she told her that T. had told the neighbor that A. had gotten away from her, but all she wanted was A. not to testify.

As defendant here correctly notes, both T. and A.'s neighbor denied attempting to dissuade A. from testifying and that defendant participated in any attempt to do so.

Defendant argued below that since the evidence of his involvement in the intimidation of A. was less than overwhelming, the prejudicial impact of the evidence outweighed its probative value for purposes of admitting it to bolster A.'s credibility and it should therefore be excluded under Evidence Code section 352. In his opening brief, defendant somewhat mischaracterizes the fall back argument he made below. In fact, he argued that if it was admitted on the issue of her credibility, a limiting instruction should be given prohibiting the jury from considering it for any other purpose, including, of course, defendant's consciousness of guilt.[22]

The trial court disagreed with defendant, finding that the foregoing constituted sufficient credible evidence of an attempt to dissuade A. and defendant's involvement in that attempt. Therefore, the court ruled, the evidence was admissible for both purposes.

Defendant here asserts that the trial court abused its discretion in admitting the evidence. We disagree with his assertion that the evidence presented did not "establish that the misconduct was committed or [was] caused by" him or that it was not substantial evidence "to establish a link to" him. Defendant now objects to some of A.'s testimony

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[22] In his opening brief, defendant represents this argument as follows, " . . . [D]efense counsel asked that the court exclude the incidents not directly linked to [defendant] and for a limiting instruction at the time the evidence was introduced informing the jurors the evidence was introduced solely for the purpose of determining the credibility of the witnesses and for no other reason." The record belies his first assertion.

on the basis that it was hearsay. However, his failure to assert this below forecloses his current claim. Moreover, it is meritless—T.'s statements are statements of a party and declarations against her own penal interests, and, therefore, admissible.[23]

Defendant also argues that A.'s claims of defendant's participation in the attempt to dissuade her are somehow unbelievable because when A. and defendant came face to face at the house when A. saw defendant, all defendant did was to greet her. However, as the trial court pointed out below, issues going to the believability of such testimony do not affect its admissibility. That was a matter for the jury to determine.

Contrary to defendant's assertion, the fact that T. did not mention defendant in connection with what occurred at A.'s school is of no moment—according to A., T. already had her "marching orders" from defendant. They were to keep A. with T. until after the preliminary hearing. T. had already failed at that the night before by allowing A. to talk her into letting her go home to retrieve her school clothes. What occurred the following day was merely T.'s attempt to rectify the situation by once again gaining control over A., as was part of her plan with defendant.

We disagree with defendant's characterization, which the trial court rejected, that the evidence linking him to the attempts to dissuade A. were weak, and, therefore, the evidence should have been excluded under Evidence Code section 352. We also disagree that the probative value of the evidence did not outweigh its prejudicial impact.

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[23] We decline defendant's invitation to prohibit the introduction of threats by a defendant against a testifying victim or witness to those cases in which the defendant admits he or she was attempting to intimidate the victim or witness.

Defendant's attempts to dissuade A., if believed by the jury, were highly relevant to both bolster her credibility and to show his consciousness of guilt.

Defendant also asserts that admission of evidence about attempts to dissuade A. denied him a fair trial. We agree with defendant that evidence of the attempts to intimidate A. took up a considerable amount of trial time. However, it cannot be forgotten that there were only three people in the motel room when the crimes were committed—one, the defendant, did not testify; another, A. did, but the third was one of the ones assertedly involved in the attempts to intimidate A. Whether T., whose testimony was the *only significant* evidence presented at trial exonerating defendant, participated in these attempts was highly relevant to the credibility of her account of the crimes. To have excluded the evidence would have rendered the trial fundamentally unfair to the People.

3. Jury Instruction on Unanimity

Defendant asserts his convictions for soliciting T. to use narcotics and for furnishing both girls with methamphetamine must be reversed because they could have been based on a number of different acts, and no unanimity instruction was given. He lists those acts as giving T. a pipe, loading a pipe with methamphetamine and smoking it with T., smoking with both girls, allowing both to smoke in the motel room and handing T. a baggie of methamphetamine.

In his opening argument to the jury, the prosecutor did not state at what exact point during the evening defendant committed either crime against either girl. Rather, he

argued that all the acts defendant committed, as testified to by A., constituted the crimes, implying that all comprised a continuing course of conduct. Defense counsel, however, designated the act that constituted the charges of soliciting/inducing/encouraging the girls to be under the influence of methamphetamine, saying "[The People] want you to believe . . . that [defendant] is the one that gave them the pipe. And when he gave them the pipe, he gave it with the specific intent, [']I want you to get high.[']" In his closing argument, the prosecutor said that A.'s version of the events was correct, but even if the jury believed only that defendant gave them the pipe, he would be guilty. As to the charges of furnishing/administering/giving away methamphetamine to the girls, defense counsel was less clear, saying that it was dependent on believing A.'s testimony. However, in his closing argument, the prosecutor asserted that even if the jury believed only that defendant gave T. the pipe, the crimes had been established.[24]

Those portions of the record defendant cites in support of the asserted second fact i.e., that defendant loaded the pipe with methamphetamine and smoked it with T. before the arrival of A., do not support such an occurrence. At those pages, the arresting officer testified that T. told him that throughout the night at the motel room, defendant packed his methamphetamine into his pipe and they took between 15 and 20 hits off it before defendant gave her the remaining methamphetamine in the baggie which she gave to A.

[24] This disposes of the People's contention that the jury necessarily found that the methamphetamine was defendant's.

to hold for her while they went on an errand.[25] Although T. did not mention A.

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[25] The testimony at these pages was as follows,

"[THE PROSECUTOR]: Did she indicate what happened once they got to the motel room?

"[THE OFFICER]: She had seen [defendant] take some methamphetamine, place it into a pipe, and she had indicated they each took between 15 and 20 hits.

"[THE PROSECUTOR]: Off the pipe?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: Did she ever indicate if [defendant] actually gave her the bag of methamphetamine?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: And what did she say in that regard?

"[THE OFFICER]: That [defendant] had given her the bag of methamphetamine to hold.

"[THE PROSECUTOR]: Did she indicate what was happening throughout the evening as they were smoking this 15 to 20 times, like how he would smoke it, who would pack it, things of that nature?

"[THE OFFICER]: She never made reference once that she had packed the pipe. It was always that [defendant] had packed the pipe with the methamphetamine.

"[THE PROSECUTOR]: Did she tell you where the methamphetamine that they used was eventually located?

"[THE OFFICER]: It was eventually located in [A.'s] back pocket.

"[THE PROSECUTOR]: Did you ever ask her why, if the methamphetamine belonged to the defendant, was it given to [A.]?

"[THE OFFICER]: Because they were going to go run some errands, and that she didn't have any pockets.

"[THE PROSECUTOR]: So she asked [A.] to hold it for her?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: And did you ask her again specifically who the methamphetamine belonged to?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: And what did she tell you?

"[THE OFFICER]: She indicated it was [defendant's]."

[¶] . . . [¶]

"[THE PROSECUTOR]: And at that point [defendant] picked her up and drove her to the hotel where they were at when you were talking with them; correct?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: Once at the hotel she indicated [defendant] gave her a bag of meth; is that right?

"[THE OFFICER]: Yes.

[footnote continued on next page]

participating in the smoking of the methamphetamine, she never asserted that she did not and her statements in this respect concerned events that happened "throughout the night" which, according to her trial testimony, involved A. smoking and the end result was that the baggie of methamphetamine ended up in A.'s pocket. As already stated, at trial, T. testified that A. smoked with her two different times. Therefore, there is no basis in the record to assert that there was an incident during which only defendant and T. smoked prior to the A.'s arrival. Rather, T.'s statement to the arresting officer supports A.'s version of events.

"[THE PROSECUTOR]: And throughout the evening she and [defendant] took approximately 15 to 20 hits off the bag -- off of the pipe; correct?

"[THE OFFICER]: Yes.

[¶] . . . [¶]

"[THE PROSECUTOR]: All right. You took that or you clarified that with her apparently, and you indicated where she was indicating to you that each of them -- according -- that will be [T.] and [defendant] smoked 15 to 20 times?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: So [T.] never told you [A.] smoked with her?

"[THE OFFICER]: Not at that time.

"[THE PROSECUTOR]: She stated that the methamphetamine they used to smoke came from the plastic baggie that was located in [A.'s] pants; correct?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: She indicated throughout the evening [defendant] would take the methamphetamine from the plastic baggie and place it in the pipe, which they would then smoke; correct?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: I asked her if the -- you then asked her if the methamphetamine belonged to [defendant], then why was it in [A.'s] possession; correct?

"[THE OFFICER]: Yes.

"[THE PROSECUTOR]: And all she told you at that point was, well she was wearing a pair of white sweats and had no pockets?

"[THE OFFICER]: Yes."

That leaves defendant giving a clean pipe to T. before A arrived, him smoking with both girls, him giving a baggie to T., which she then gave to A., and him allowing them to use the motel room in which to smoke.

We agree with defendant that a unanimity instruction should have been given. However, reversal is not required if the error is harmless beyond a reasonable doubt. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-187.) The jury's not guilty verdict on the solicitation count involving A. indicates that each juror believed and relied on T.'s trial testimony that all defendant did was provide her with a pipe. If any juror had believed A.'s account, there would have been no rational basis for finding defendant not guilty of soliciting her but not T. The same is true if any juror relied only on the fact that defendant supplied the motel room or the baggie, which made the left over methamphetamine available to both girls. Therefore, we conclude that the error was harmless beyond a reasonable doubt.

DISPOSITION

The trial court is directed to amend the abstract of judgment to show that the verdicts were the result of a jury, not a court, trial, as it currently states. In all other respects, the judgment is affirmed.

RAMIREZ, P.J.

We concur:
HOLLENHORST, J.
GAUT, J.